In The United States District Court
For The District of Columbia
[FILED 9/20/95]

UNITED STATES OF AMERICA,		
	Plaintiff,	
v.		Civil Action No.:95 1804
NATIONAL AUTOMOBILE DEALERS ASSOCIATION,		
	Defendant.	

COMPETITIVE IMPACT STATEMENT

The United States of America, pursuant to Section 2 of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b), submits this Competitive Impact Statement regarding the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On September 20, 1995, the United States filed a civil antitrust complaint under Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, alleging that the defendant, the National Automobile Dealers Association ("NADA"), entered into agreements intended to lessen competition in the retail automobile industry in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Specifically, the complaint alleges that the NADA, through its officers and directors:

(a) agreed to orchestrate a group boycott in an attempt to coerce automobile manufacturers to decrease the discounts offered to large volume buyers and to eliminate consumer rebates;

(b) agreed to urge its dealer members to maintain new vehicle inventories at levels equal to 15-30 days' supply;

(c) solicited and obtained agreements from member dealers not to engage in invoice advertising; and

(d) agreed to urge its members not to do business with automobile brokers.

The complaint seeks relief that would prevent the NADA from continuing or renewing the alleged practices and agreements, or engaging in other practices or agreements that would have a similar purpose or effect.

On September 20, 1995, the United States and the NADA also filed a stipulation in which they consented to the entry of a proposed Final Judgment that would prohibit the NADA from engaging in certain anticompetitive practices, and would require the NADA to implement an antitrust compliance program. The proposed Final Judgment provides all of the relief that the United States seeks in the Complaint.

The United States and the NADA have agreed that the Court may enter the proposed Final Judgment after compliance with the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16 (b) - (h), provided the United States has not withdrawn its consent. Entry of the proposed Final Judgment will terminate the action, except that the Court will retain jurisdiction over the matter proceedings to construe, modify, or enforce the Final Judgment, or to punish violations of any of its provisions.

II. DESCRIPTION OF PRACTICES GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

The NADA is a national trade association, headquartered in McLean, Virginia, that represents approximately 84% of the franchised new car and truck dealers in the United States. Franchised dealers purchase new cars and trucks from manufacturers pursuant to franchise agreements, and in turn sell those cars and trucks and provide related services to consumers. The members of the NADA compete with each other and with other car and truck dealers to sell motor vehicles and other auto products and services to consumers. Dealers compete by offering different prices,

quality of service, and selection of cars. NADA's members had retail sales of products and services of approximately $375 billion in 1993.

1. Agreement Concerning Inventory Levels

In recent years, automobile manufacturers have used certain sales and marketing practices designed to stimulate car sales, including fleet subsidies and consumer rebates. Fleet subsidies are discounts offered to purchasers of large quantities of cars, such as rental car companies and large corporations. These discounts can be larger than the discounts offered to franchised dealers. Fleet purchasers often resell fleet vehicles directly to the public or to non-franchised automobile dealers, who in turn sell them to the public. Prior to 1991, many fleet vehicles were sold in the same year as new cars of the same model year. Fleet vehicles, therefore, directly competed with new vehicle sales, but fleet cars were sometimes offered at prices thousands of dollars less than similar new cars. During the late 1980's and early 1990's, the NADA objected to manufacturers' practices of offering substantial fleet discounts. The NADA claimed that fleet subsidies created a class of vehicles that, because of their lower prices and mileage, unfairly increased competition with new vehicle sales.

The NADA also objected to manufacturers' use of consumer rebates to stimulate sales. Consumer rebates are cash incentives offered by manufacturers directly to consumers. In recent years, manufacturers have increased the amount and frequency of consumer rebates that they offered to entice consumers to purchase new automobiles. During the time period covered by the Complaint, many analysts estimated that consumer rebates saved consumers as much as $1,000 per car. Many franchised dealers believe that when manufacturers offer rebates to consumers, franchised dealers are forced to offer their own rebates to consumers who purchase cars immediately before or after the rebate period. During the late 1980's and early 1990's, the NADA repeatedly urged manufacturers to give franchised dealers, rather than consumers, all discounts and incentives designed to stimulate sales.

In September, 1989, the NADA's president drafted a document entitled "An Open Letter to All Dealers" ("Open Letter"). The Open Letter claimed that manufacturers' use of fleet subsidies had contributed to automobile dealers' financial difficulties. It also discussed the NADA's attempts to convince consumer manufacturers not to offer rebates to consumers, and instead to give all incentives to dealers. The Open Letter concluded with a recommendation that all automobile dealers reduce their inventories to a 15-30 day supply of new vehicles. The letter then stated that the NADA would "advise dealers immediately of any movement by their franchisors which will assist dealers."

Dealers customarily have substantially more than 15-30 days' supply of new cars in inventory at any given time. Sixty to ninety days' supply is more typical. A dealer that unilaterally reduced its inventory by a substantial amount would risk losing sales to other dealers that maintain a greater selection of cars. If dealers collectively reduced inventories, however, they could lower their inventory costs without losing sales to competing dealers. Such an action would adversely affect manufacturers, which would see a dramatic reduction in orders.

On October 23, 1989, the NADA president wrote a letter to Oregon dealers in which he called the Open Letter the NADA's "first response" to manufacturers who made little or no compromise with the NADA. The Open Letter was unanimously endorsed by the NADA's Executive Committee and board of directors and published in the October 30, 1989 issue of *Automotive News* as a two page advertisement. It was also published in the NADA's official publication, *Automotive Executive*, and sent to numerous representatives of the media and major automobile manufacturers.

At the NADA's 1990 Annual Convention, the NADA president claimed that he had been unable to obtain any concessions from manufacturers until after the Open Letter was published and dealers responded by cutting their new car orders. He further observed that: "Twenty-five thousand dealerships -- doing anything more or less together -- is bound to come to the attention of our suppliers."

The Complaint alleges that the Open Letter reflected an agreement by the NADA to reduce and maintain inventory levels equal to 15-30 days' supply unless and until automobile manufacturers adopted policies more favorable to dealers. An agreement by a trade association to recommend that all dealers maintain a particular inventory level is a per se violation of § 1 of the Sherman Act. An agreement by a trade association to boycott a supplier by encouraging its members to withhold or reduce orders is also a per se violation of the Sherman Act.

2. Agreement Concerning Advertising

Invoice advertising is advertising that reveals the dealer's invoice or cost to purchase a vehicle, or offers to sell the vehicle to the public at a price based upon the dealer's invoice or cost to purchase the vehicle. The Complaint alleges that the NADA has frequently expressed its opposition to invoice advertising, at least in part because it believes that such advertising leads to lower retail selling prices for new vehicles.

On several occasions between 1989 and 1994, an officer of the NADA contacted automobile manufacturers to complain about dealers who had engaged in invoice advertising. The NADA officer also complained directly to the dealers in question about the advertisements. He used NADA letterhead and referred to his position with the NADA in a manner that suggested that he was acting on behalf of NADA in communicating his complaints and seeking agreement from the dealers. In some instances, the NADA officer obtained the dealers' agreement not to engage in further invoice advertising. Such an agreement by a trade association or its members not to engage in certain types of advertising is a per se violation of the antitrust laws.

3. Agreement to Boycott Brokers

Automobile brokers generally buy new vehicles from franchised dealers at discounted prices and resell the vehicles directly to the public in competition with franchised dealers. On numerous occasions, the NADA has expressed its dissatisfaction with competition by brokers. In 1994 a task force appointed by the NADA's Board of Directors issued a report urging dealers to boycott

automobile brokers. The report recommended that dealers "Refuse to do business with brokers or buying services. They inevitably do harm to new vehicle gross margin potential." Although the NADA eventually revised the report to eliminate that recommendation, the original version of the report was first disseminated to over 200 dealer representatives and other individuals active in the automobile industry. An agreement by a trade association or its members not to do business with other competitors or customers for purposes of restricting price competition is a per se violation of the Sherman Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the Court may enter the proposed Final Judgment at any time after compliance with the APPA. The proposed Final Judgment states that it shall not constitute an admission by either party with respect to any issue of fact or law. Section III of the proposed Final Judgment provides that it shall apply to the NADA and each of its officers, directors, agents, employees, committee and task force members, and successors, and any organization that acquires or merges with the NADA.

Section IV of the Proposed Final Judgment contains five categories of prohibited conduct. Section IV (A) contains a general prohibition against any agreements by the NADA with dealers to fix, stabilize or maintain prices at which motor vehicles may be sold or offered in the United States to any consumer. Sections IV (B) - (E) address the specific activities of the NADA and its officers and directors that were the source of the antitrust violations.

Section IV (B) of the Proposed Final Judgment prohibits the NADA from urging, encouraging, advocating, or suggesting that dealers adopt specific prices, specific margins, specific discounts, or specific policies relating to the advertising of prices or dealer costs of motor vehicles. Similarly, Section IV (C) prohibits the NADA from discouraging dealers from adopting specific pricing systems or specific policies relating to the advertising of prices or dealer costs of motor vehicles. Sections IV (B) and (C) prohibit the NADA from urging or encouraging members to

make uniform or collective decisions with respect to key areas in which they compete, such as prices or advertisements.

Section IV (D) prohibits the NADA from urging dealers to refuse to do business with particular types of persons, to reduce their business with particular types of persons, or to do business with particular persons only on specified terms. This provision is intended to prohibit the NADA from using the threat of a group boycott to attempt to pressure manufacturers into changing polices. It will also bar the NADA from urging dealers to reduce or eliminate the amount of business they do with particular types of buyers, such as brokers. Finally, Section IV (E) prohibits the NADA from terminating the membership of any dealer for reasons relating to that dealer's pricing or advertising of prices or dealer costs.

Section V of the Proposed Final Judgment contains certain limiting provisions that clarify the scope of the prohibitions in Section IV. Section V identifies specific NADA activities that are unlikely to restrict competition and are not prohibited by the decree. Specifically, Section V (A) provides that the NADA may (1) continue to disseminate specific valuation information in the N.A.D.A. Official Used Car Guide; (2) engage in collective action to procure government action, such as lobbying activities, when those actions are immune from antitrust challenge under the *Noerr-Pennington* doctrine; (3) present the views, opinions, or concerns of its members on topics to manufacturers, dealers, consumers, or other interested parties, provided that such activities do not violate any provision contained in Part IV; (4) conduct surveys, and gather and disseminate information, in accordance with *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925) and its progeny; (5) participate in bona fide dispute resolution activities involving the parties to specific transactions; and (6) disseminate information about laws and government regulations that affect dealers, and encourage dealers to comply with those laws. Section V (B) clarifies that nothing in the proposed Final Judgment limits individual dealers' rights to act independently.

Section VI of the Proposed Final Judgment requires the NADA to publish a notice describing the Final Judgment in *Automotive Executive*, the NADA's automobile industry trade publication,

within 60 days after this proposed Final Judgment is entered, and to send a copy of the notice to each dealer who becomes a member of the NADA during the ten-year life of this Final Judgment.

Sections VII and VIII require the NADA to set up an antitrust compliance program to ensure that the NADA's members are aware of and comply with the limitations in the proposed Final Judgment and antitrust laws. They require the NADA to designate an antitrust compliance officer and to furnish a copy of the Final Judgment, together with a written explanation of its terms, to each of its officers, directors, non-clerical employees, and members of committees and task forces that address issues related to the purchase and sale of automobiles. The NADA is also required to review the final draft of each speech and policy statement by each officer, director, employee, and committee and task force member, as well as the content of each letter, memorandum and report written by or on behalf of each director in his capacity as NADA director, in order to ensure adherence to the Final Judgment.

Section IX of the Proposed Final Judgment provides that, upon request of the Department of Justice, the NADA shall submit written reports, under oath, with respect to any of the matters contained in the Final Judgment. Additionally, the Department of Justice is permitted to inspect and copy all books and records, and to interview officers, directors, employees and agents of the NADA.

The Government believes that the proposed Final Judgment is fully adequate to prevent the continuation or recurrence of the violations of Section 1 of the Sherman Act alleged in the Complaint, and that disposition of this proceeding without further litigation is appropriate and in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys fees. Entry of

the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the defendant.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wants to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to the comments. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Mary Jean Moltenbrey
Chief, Civil Task Force II
U.S. Department of Justice
Antitrust Division
315 7th Street, N.W., Room 300
Washington, D.C. 20530

Under Section X of the proposed Final Judgment, the Court will retain jurisdiction over this matter for the purpose of enabling either of the parties to apply to the Court for such further orders or directions as may be necessary or appropriate for the construction, implementation, modification, or enforcement of the Final Judgment, or for the punishment of any violations of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The only alternative to the proposed Final Judgment considered by the Government was a full trial on the merits and on relief. Such litigation would involve substantial cost to the United States and is not warranted, because the proposed Final Judgment provides appropriate relief against the violations alleged in the Complaint.

VII. DETERMINATIVE MATERIALS AND DOCUMENTS

No particular materials or documents were determinative in formulating the proposed Final Judgment. Consequently, the Government has not attached any such materials or documents to the proposed Final Judgment.

Respectfully submitted,

Dated: September __, 1995

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